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No. 94-771

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF STATES OF SOUTH DAKOTA, CALIFORNIA, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, NORTH DAKOTA, OREGON, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER, OKLAHOMA TAX COMMISSION

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The State of South Dakota, and the other amici states, through their respective Attorneys General, respectfully submit a Brief Amicus Curiae pursuant to Supreme Court Rule 37.5 in support of the Petitioner.

INTEREST OF AMICI

The amici States have a compelling interest in the clarity and proper application of Indian law principles affecting their authority to impose taxes as to Indian Country transactions or on tribal members with respect to legal relationships established outside Indian Country. Lack of clarity in the principles themselves or their misapplication by lower courts inevitably lead to time- and resource-consuming litigation, as reflected in the Court's recent decisions involving the Petitioner. *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S. Ct. 1985 (1993); *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe,* 498 U.S. 505 (1991).

This matter presents another opportunity for the Court to reaffirm two core rules with respect to the taxation of tribes and tribal members within and without Indian Country – rules which are mirror images of one another. Within Indian Country set aside for a particular tribe, it and its members may not be forced to bear the legal incidence of a state tax absent clearly-expressed congressional authorization. Outside Indian Country, however, tribes and their members are subject to otherwise nondiscriminatory state taxes unless Congress explicitly has immunized them from such taxation. While one or both of these formulations may be criticized by the

parties here as wooden, they nonetheless provide a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.

SUMMARY OF THE ARGUMENT

Two bedrock Indian law preemption principles control disposition of the questions presented in this matter. First, "[i]n the special area of state taxation," congressional consent is necessary before the legal incidence of a tax may be imposed on a tribe or its members as to transactions occurring on Indian Country set aside for their benefit. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *accord Dept. of Tax. & Fin. v. Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2035 (1994); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993); *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973). Second, once tribes or tribal members leave Indian Country, they are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *accord Sac and Fox Nation*, 113 S. Ct. at 1991; *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 n.16

(1985). These principles, like many general rules, often are more easily stated than applied, but here their application is relatively straightforward.

Although the parties dispute where the legal incidence of Oklahoma motor fuel taxes lies, it is undisputed that, however that issue is decided, the Respondent or its members, either as the retailer or the ultimate consumer, will shoulder the legal incidence for any fuel that they purchase. Whether the Petitioner's or the Respondent's position concerning the taxes' incidence is accepted has obvious practical importance to them since that determination affects the extent to which the taxes can be challenged, but, from the amici States' standpoint, the more critical question is whether the Hayden-Cartwright Act, 4 U.S.C. § 104, provides the requisite authority to tax Indian Country motor fuel purchases by the Tribe or its members. The statute so indicates when read literally, and that literal reading is not only consistent with relevant legislative history but also with contemporaneous administrative interpretation by the Attorney General and the Department of Interior. Regardless of how it resolves the tax incidence issue, the Court should remand this matter for consideration whether Oklahoma may rely on the Hayden-Cartwright Act and, if so, whether it applies.

The Court of Appeals erred in concluding that Oklahoma lacks authority to tax the Respondent's members residing outside Indian Country with respect to income earned from tribal employment within Indian Country. The court's reliance on the 1830 Treaty of Dancing Rabbit Creek is insupportable because, at most, that treaty preserved the Respondent's jurisdictional primacy merely as

to its own territory and does not constitute the requisite express congressional exemption from obligations otherwise imposed under state law by virtue of non-Indian Country transactions – here the act of Chickasaw Nation members establishing residency off tribal lands. Although the Respondent has not relied on the second prong of the preemption test articulated in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-43 (1980) – interference with tribal self-governance – to except those members from the state income tax, there would be no credible basis for that contention even if it were raised.

ARGUMENT

I.A. This Court Should Vacate The Judgment Of The Tenth Circuit Court And Remand With Instructions To Determine The Applicability Of The Hayden-Cartwright Act.

The Tenth Circuit Court acknowledged the existence of the Hayden-Cartwright Act and, apparently, considered the possibility that Hayden-Cartwright might be dispositive. The court however avoided application of Hayden-Cartwright, pointing out that Oklahoma had not raised the issue.[1] This Court has never determined the applicability of the Hayden-Cartwright Act to sales of motor fuel to Indians within Indian reservations. It has, however, indicated interest in the question on two occasions.

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[1] *Chickasaw Nation v. Oklahoma,* 31 F.3d 964, 972 (10th Cir. 1994).

The first was *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *White Mountain*, the tribe and its non-Indian logging company challenged an Arizona motor fuel tax under facts carefully tailored to avoid the application of the Hayden-Cartwright Act. The logging company kept detailed mileage records of state-maintained highway use within the reservation. The logging company paid (and the tribe reimbursed the company) without protest that portion of the challenged motor fuel tax attributable to the logging company's operation on state-maintained reservation roads. Such payment (and tribal reimbursement) implicitly acknowledged the tribe's obligation to pay those state motor fuel taxes attributable to use of state-maintained highways within the reservation.

The second occasion was *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 N.Y.2d 536, 508 N.E.2d 914 (1987) (finding regulations preempted by federal law), vacated and remanded, 487 U.S. 1212 (1988), on remand 72 N.Y.2d 720, 533 N.E.2d 255 (1988). In *Herzog Brothers*, a motor fuel wholesaler challenged New York's imposition of state motor fuel taxes upon him because all of his sales were to Indian retailers on a reservation. The Court, at the suggestion of the United States Solicitor General, vacated the judgment and remanded the case to the Court of Appeals of New York for reconsideration in light of proposed regulations adopted by the state tax commission. In both *White Mountain* and *Herzog Brothers*, the Solicitor General filed amicus briefs. In each instance he acknowledged the presence of a close question on the applicability of Hayden-Cartwright. In each instance the Solicitor General cited a 1940 opinion of the Interior

Solicitor, who, relying on the Hayden-Cartwright Act, held that the Wisconsin state motor fuel tax must be imposed on all sales of motor fuels to Indians and non-Indians alike on the Menominee Indian Reservation. In each instance he acknowledged the potential applicability of the 1940 Solicitor opinion.[2] In *White Mountain,* he suggested that Hayden-Cartwright not be considered because the logging company and the tribe had paid the tax attributable to the use of the state-maintained reservation roads.[3] In *Herzog Brothers,* the Solicitor General squarely suggested that the case be remanded for consideration of the state law change and also the applicability of the Hayden-Cartwright Act. He wrote:

> A remand to the court of appeals also would allow that court to consider the extent, if any, to which the Hayden-Cartwright Act applies to sales of motor fuel to Indians or non-Indians on

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[2] 57 I.D. 129, 139 (1940); Felix Cohen agreed with the Department of Interior's administrative ruling in his seminal treatise, as did the subsequent revisions of that treatise. F. Cohen, "Handbook of Federal Indian Law" 264 (1942); U.S. Department of Interior, "Federal Indian Law" 870 (1958); F. Cohen, "Handbook of Federal Indian Law" 411-12 (1982).

[3] The Solicitor General's brief suggested that because the tribe, the Bureau of Indian Affairs or the logging company had borne the road maintenance and construction costs in question, the Hayden-Cartwright Act did not apply. Brief for the United States as Amicus Curiae at 15; *White Mountain Apache Tribe v. Bracker,* United States Supreme Court, 448 U.S. 136 (1981) (No. 78-1177). No such factual distinction exists in this case. Oklahoma contains over 1,099,301 acres of trust land. That state has 112,000 miles of rods maintained within its borders, including trust land. Not a single mile is maintained by the BIA. U.S. Dept. of Transportation, *County Road Mileage* at III 65-6 (1992).

> Indian reservations. The court of appeals did not address the possible application of that act in the decision under review.[4]

We agree. It should be done now on remand because as the Solicitor General has recognized and as developed below, very substantial grounds exist to conclude that the Hayden-Cartwright Act provides the Congressional consent to impose Oklahoma's fuel taxes on the Respondent or its members.[5]

I.B. The Plain Language Of The Hayden-Cartwright Act And Contemporaneous Interpretations Should Control And Be Dispositive Regardless Of The Outcome Of The Legal Incidence Question.

It is often argued that this Court has adopted a per se rule regarding imposition of state taxes in Indian Country. "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 215 n.17 (1987); *see also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 112 S. Ct. 683

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[4] Brief for the United States as Amicus Curiae at 16 n.10; *State Tax Commission of New York v. Herzog Bros. Trucking, Inc.,* No. 87-382.

[5] The New York Court of Appeals refused to consider Hayden-Cartwright on remand, (*Herzog,* 533 N.E.2d 255, 258) and adhered to its now rejected view that New York's motor fuel tax regulations were preempted by the federal trader statutes. *See Milhelm Attea,* 114 S. Ct. 2028, 2031 n.2 (linking New York's cigarette and motor fuel tax regulations) overruling the federal trader statute preemption analysis.

(1992).[6] " 'Absent cession of jurisdiction or other federal statutes permitting it,' we have held, a state is without power to tax reservation lands and reservation Indians." *Id.* at 688.

The taxes at issue in the first question herein are motor fuel taxes. Amici States believe Oklahoma may impose motor fuel taxes on sales to all persons within Indian Country because a federal statute authorizes the tax.

> § 104. Tax on motor fuel sold on military or other reservation[;] reports to State taxing authority
>
> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of

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[6] The Ninth Circuit relied on the fundamental principles set forth in *Yakima*, and correctly so, to squarely reject an argument that would have narrowly confined *Yakima* to its facts. *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (994). This same argument, with the support of the United States, has recently been renewed and is now pending in the Tenth Circuit. *Southern Ute Indian Tribe v. Board of County Com'rs. County of La Plata, et al.*, 855 F.Supp. 1194 (D. Colo. 1994) *appeal docketed*, No. 94-1310 (10th Cir. July 8, 1994.

> Columbia, within whose borders the reservation affected may be located.
>
> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.
>
> (c) As used in this section, the term "Territory" shall include Guam.

Public Law 74-686, § 10, 49 Stat. 1519, 1521-22 (1936) (codified as amended at 4 U.S.C. § 104). The Hayden-Cartwright Act, 4 U.S.C. § 104, is specific congressional authorization for states to impose motor fuel taxes with respect to all fuels sold within Indian reservations unless that fuel is destined for "the exclusive use of the United States."

A crucial term in the Hayden-Cartwright Act is "licensed traders." Congress has, pursuant to its plenary power to regulate commerce with the Indian tribes, required Indian traders to obtain licenses since 1790. This Court thus has observed that the United States

> has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a *licensed trader's* premises.

Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 689 (1965) (emphasis added). By 1936, the term "licensed traders" had been connected with United States Indian affairs for 146 years. It is little wonder that the Interior Solicitor concluded in 1940 that "the reference to *'licensed traders'* is particularly suggestive of Indian reservations."[7]

Further, the term "licensed traders" was understood by Congress to be Indian traders during debate on the Buck Act in 1940. Congressman Buck reported on April 23, 1940, that he had personally experienced "licensed trader" problems:

> We had some bad situations with regard to these *licensed traders.* There are *licensed traders* on certain reservations, for instance, at Palm Springs, Calif., you have your reservation line right down the street, and on one side of the street you have merchants who are paying sales taxes, and on the other side you have *licensed traders* who are not paying any sales tax on identically the same types of goods.[8]

Finally, "licensed traders" appears in the United States Code only in the Hayden-Cartwright Act. That term also appears in the Code of Federal Regulations only in Title 25.

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[7] 57 I.D. 129, 139 (1940)

[8] Hearing on H.R. No. 6687, before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. 2 (Apr. 23, 1940) (emphasis added). The Agua Caliente Indian Reservation exists on the checkerboard pattern in the area of Palm Springs, California. This court may take judicial notice of the geographic fact that the only federal reservation in the vicinity of Palm Springs, California is the Agua Caliente Indian Reservation. *Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F. Supp. 279, 281 (C.D. Cal 1969).

The boundaries of the additional key term "other reservations," were considered by the Attorney General in 1936, four months after the Act's adoption. He looked to the decisions of this Court for guidance and adopted the definition below:

> The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, *or an Indian reservation*, or, indeed, one for any purpose for which Congress has authority to provide.

38 Opinions of Attorney General 522, 524 (1936). (Citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)) (Emphasis supplied). This Court has also recently taken a broad view of the phrase "reservation." *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 113 S. Ct. 1985 (1993).

Moreover, Senator Hayden, who served on the conference committee which authored the Hayden-Cartwright Act, previously served in the House of Representatives. In 1921, he advocated use of the phrase *"reservations under federal control"* specifically to allow Indian lands to be treated as "unappropriated public lands" and thereby increase federal matching funds for the federal highway aid program. The history shows that Senator Hayden understood that "federal reservations" included Indian reservations.[9]

It is therefore significant that Congress revisited the Hayden-Cartwright Act on three occasions after the issuance of the Attorney General Opinion and twice after the Interior Solicitor opinion, but did not change or amend

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[9] *See* extended discussion *infra* at pages 13 to 15.

the basic act. The first amendment was the Buck Act, 54 Stat. 1059, 1060 (1940) (codified at 4 U.S.C. 105 et seq.) This law subjected all persons in "federal areas" except for "any Indian not otherwise taxed" to state sales, use, and income taxes. Section 7 of the Buck Act expanded the types of motor fuel taxes subject to the Hayden-Cartwright Act. Congress explicitly excepted Indians from the provisions of the Buck Act but did not disturb the broad application of Hayden-Cartwright to Indian reservations. Congress then reenacted the Hayden-Cartwright Act without change in 1947 (61 Stat. 641, 644) and added a new section extending coverage to Guam in 1956 (70 Stat. 799). Surely if Congress had meant to overturn existing federal authority with regard to reservation sales of motor fuels to Indians, it easily could have done so on each occasion. Congress did not. Congress is presumed to know the administrative interpretation of a statute and to have adopted that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

The settled rules of statutory construction adopted by this Court should apply in this case and the plain language of 4 U.S.C. § 104 controls. *Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993). That plain language removes all impediments to state taxation of motor fuels sold on Indian reservations to any person including the Respondent or its members. This conclusion, however, is also supported by relevant legislative history.

I.C. The Legislative History Preceding And Surrounding The Enactment Of The Hayden-Cartwright Act Compels A Broad Application Of The Statute.

Cases such as *Bryan v. Itasca County*, 426 U.S. 373 (1976) suggest that legislative history of the federal

enactment at issue may be examined on the question of imposition of state taxes within Indian reservations. Historical analysis compels the conclusion that the Hayden-Cartwright Act specifically authorizes Oklahoma's (and all other states) motor fuel taxes to be imposed on all purchasers in Indian Country.

1. Initial Federal Involvement In Highway Financing: The Property Tax Mode

About the turn of this century, a political force known as the "good roads" movement began to impact all levels of government in the United States. The movement advocated local, state and federal funding of quality, all-weather roads for mail delivery and general public access. By 1900 most local and state governments had enacted real property tax levies to support public road projects, but the federal government had little involvement except research. The explosive popularity of the automobile changed all that. In 1900 there were about 8,000 automobiles in the United States. By 1910, motor vehicles multiplied to 468,500 and jumped to 2,491,000 by 1915.[10] Congress was forced to become seriously involved in public road construction.

Initial federal aid for public roads assisted rural mail delivery. The Post Office Department Appropriations Act, 37 Stat. 539, 551 (1912), provided money to improve the condition of selected post roads, and in general, study

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[10] U.S. Department of Transportation, *America's Highways, 1776-1976*, "A History of the Federal Aid Program," p. 67 (1976) (hereafter "America's Highways").

whether improvement of the roads could improve rural mail delivery service. On July 11, 1916, Congress passed "An Act to Provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." 39 Stat. 355. This first federal aid highway bill focused on rural post roads and forged a public highway partnership between states and the federal government. The 1916 enactment provided:

1. That the United States would fund construction of approved rural post roads for one-half of the actual cost up to $10,000 per mile. 39 Stat. 355, 358.
2. States would (at their own expense) properly maintain federally funded roads.
3. States would both construct and maintain most roads on public lands. (The 1916 bill authorized roads only on national forest lands.)
4. All roads constructed with federal aid funds would be available for free public use. 39 Stat. 355, 356.

The 1916 bill fixed an apportionment formula for fund distribution to states; one-third was distributed on state population, one-third on land area, and one-third on rural mail delivery route mileage. 39 Stat. 355, 357.

This formula was flawed, however, because in 1916 states used property taxes to generate the monies necessary to participate in the highway program. Many Western states contained massive federal lands, including national parks, national forests, military reservations, and Indian reservations. Public roads were needed on these lands. However, they produced no tax revenue to support

public roads.[11] Congress addressed, in part, the problem in 1921, by amending the one-third formula to account for public lands.[12] Any state containing over five percent of "unappropriated public land" received increased federal highway funds.[13] This formula modification was inadequate according to Representative Hayden and others because, as Representative Robsion said:

> Many of the states have not only used state revenues to aid in the building of public roads in the states on public lands, but they have gone further, namely, through Indian reservations.

61 Cong. Rec. 7123. Representative Hayden recognized the reality that Indian reservations created state tax revenue problems identical to other public lands. He thus attempted to amend the 1921 bill to include "reservations under federal control" with "unappropriated public lands" in the formula for federal matching funds. During floor debate, he stated:

> It has been said in another body that there is no authority of law for the expenditure of federal aid road funds on roads within Indian reservations, but whoever it was that made that assertion evidently had not looked at the law. The Federal aid act as amended now provides that –

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[11] Philip H. Burch, Jr., *Highway Revenues and Expenditure Policy in the United States*, 218 (1962) (hereafter Burch).

[12] 42 Stat. 212, 214 (1921). *See also* 61 Cong. Rec. 1468-69 (1921) (Statement of Senator Pitman); *see also* Senate Committee on Post Offices and Post Roads, Report No. 40, May 9, 1921.

[13] *Ibid.* See also, Burch at p. 218.

> The Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction * * * any public road a major portion of which is now used or can be used, * * * for the transportation of the United States mails.
>
> A public road is a way for passage or travel that is open to use by all persons without discrimination. The roads on all Indian reservations are freely used by anyone who desires to travel thereon, and the United States mails are regularly transported on them. *The Indian reservation roads, therefore, as fully and completely comply with every requirement of the law as any other roads in the United States that have received that benefit of Federal aid.*

61 Cong. Rec. at 7134 (emphasis added). Because Arizona used state and federal aid money to build roads within Indian reservations in Arizona, he additionally pointed out there was no reason why untaxed Indian lands should be treated differently than "unappropriated public lands":

> The Senate has recognized that the western states are entitled to pay less share of road construction in proportion to the area of unappropriated public lands within their borders. The only reason for granting this recognition is that the public lands cannot be taxed. But the title to every acre within an Indian reservation, a national forest, a national park, or a military reservation is also in the United States and for that sole cause is not subject to state taxation. Since the exemption of the public lands from any form of taxation by the states is the only basis for the action taken by the Senate, I cannot

> see by what logic that body could fail to agree with the House that all other untaxed lands in "reservations under federal control" should likewise be taken into consideration in determining the share to be advanced by the western states for road construction under the federal aid plan.

61 Cong. Rec. at 7135. Representative Hayden did not carry the day in 1921, but his sound reasoning eventually would.

The inequity perceived by Representative Hayden was remedied in 1925. The proponent of the amendment was Representative Hastings of Oklahoma. He stated:

> We in Oklahoma have a large amount of Indian lands. In the eastern part of the state alone there were 19,500,000 acres. Some of these lands have been made taxable. All have been allotted, but a great part of them remain nontaxable. This is true with reference to lands allotted to Indian tribes in western Oklahoma.
>
> The chief of the Bureau of Public Roads endorsed this provision[14] and recognized that it was fair to place nontaxable Indian lands in the same class with unappropriated public lands.

65 Cong. Rec. 10718 (1924). The 1925 Federal Highway Act was amended to accomplish that objective by inserting the words "and nontaxable Indian lands, individual

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[14] The "provision" Representative Hastings references is H.R. 8885 which would have placed "non-taxable Indian lands, individual and tribal" in the same class with unappropriated public lands. *See* 65 Cong. Rec. 10718 (1924).

and tribal" in every location after the words "unappropriated public lands." 43 Stat. 889, 890 (1925).

2. The Hayden-Cartwright Act: Congressional Recognition Of The Motor Fuel Tax As The Principal Component Of Highway Financing

Even as Congress was adjusting its funding mechanism to reflect the States' traditional reliance on property taxes to finance road construction and maintenance, a sea change in that financing method was occurring. The motor fuel tax was first imposed by Oregon in 1919.[15] The motor fuel tax shifted the fiscal burden of support of public roads from the real property owner to the user of the service. By 1929, 26.5 million motor vehicles generated 763.4 million dollars in road user taxes which represented 99 percent of actual state expenditures on highways.[16]

The federal aid highway program funded by state and federal motor fuel taxes,[17] became a major tool to create public works during the Great Depression. Congress more than tripled highway aid appropriations.[18]

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[15] *City of Portland v. Kozer*, 217 P. 833, 108 Or. 375 (1923); *See also, America's Highways*, p. 114.

[16] *America's Highways*, p. 115

[17] During the Depression, tax revenues from income and property taxes became almost non-existent. Gas tax revenues were, however, stable. As a result, the federal government designed much of their economic recovery policy around road construction. *America's Highways*, p. 123-4.

[18] Federal aid highway appropriations in 1921 and 1927 were $75,000,000; 42 Stat. 212, 216; 43 Stat. 889; and by 1933, $400,000,000; 48 Stat. 195, 203.

The federal government continued to expand the presence of state highway departments within Indian reservations. The National Industrial Recovery Act of 1933, appropriated 400 million dollars for the emergency construction of public highways and related projects by state highway departments and earmarked 50 million dollars for *Indian reservations,* and other public lands.[19] Congress appropriated another 200 million dollars in 1934[20] to be expended by state highway departments under the Federal Aid Road Act. Separate appropriations of 24 million and 2.5 million dollars were made for *state highway projects* on *Indian reservations,* and public lands.[21]

In 1934, Congress also addressed another problem; namely, many States were diverting motor fuel tax collections to purposes other than road construction and maintenance. Diversion was detrimental to economic recovery.[22] Consequently, Congress acted to discourage diversion of motor fuel tax revenues by the states.

> Since it is unfair and unjust to tax motor vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, federal aid for highway construction

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[19] 48 Stat. 195, 204 (1933).

[20] Pub. L. 73-393, 48 Stat. 993 (1934)

[21] The same bill appropriated four million dollars for each of two fiscal years for the construction and improvement of Indian reservation roads which were not eligible for federal highway aid. 48 Stat. 993, 995, § 8.

[22] A dollar spent on direct relief supported less people than a highway construction dollar, which kept eight people employed. *America's Highways,* p. 124.

> shall be extended only to those states that use at least the amounts now provided by law for such purposes in each state from state motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes, under such regulations as the Secretary of Agriculture shall promulgate from time to time.

48 Stat. 993, 995. The States responded with a series of constitutional amendments or statutes earmarking gas tax revenues substantially as suggested by the federal government. By 1942, fourteen States had constitutional amendments.[23]

The transition from property taxes to motor fuel taxes as a funding source for public highways did not lessen the need of western states for favored highway funding by Congress. These states were still handicapped because of "public lands and Indian reservations", but in a different way.

"Public lands" inhibited state gas tax revenues in two ways. First, "public lands" usually equate with sparsity of population. Much "public land" is not inhabited. States with large amounts of public land, and therefore large commitments to build roads but small populations, were

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[23] *Ibid.*

still entitled to the enhanced federal highway aid.[24] Second, those "public lands" which *were* populated (i.e. military and Indian reservations) presented the second impediment to collection of state gas tax revenues. Filling stations on *occupied public lands* were selling gas *free* of the *state motor fuel tax*. In *Standard Oil Co. v. California*, 291 U.S. 242 (1934), this Court held that California's state motor fuel tax could not be imposed on gasoline sold at the Presidio, a military reservation in San Francisco. As a result, motorists could purchase Presidio gasoline state-tax free and for consumption on state-maintained public highways.

Predictably, state highway officials complained to their Congressmen and Senators.[25] Bills were introduced allowing States to collect their motor fuel taxes within federal areas. *See* 78 Cong. Rec. 8930 (1934) H.R. 9641; *see also* 79 Cong. Rec. 366 (1935) H.R. 3660. The eventual Congressional response was the federal aid highway appropriations bill, to which now Senator Hayden moved an amendment:

> That all taxes levied by any state upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, or other similar agencies, located on the United States military or other reservations, when such fuels are used for other than governmental purposes. Such taxes, so levied,

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[24] *Burch*, p. 218.

[25] *See* 79 Cong. Rec. 4083 (1935) and 80 Cong. Rec. 6913 (1936).

> shall be paid to the proper taxing authorities of the state within whose borders the reservation affected may be located.

80 Cong. Rec. 6913 (1936). He simultaneously presented a resolution of the Western Association of State Highway Officials in support of his amendment which read in part:

> Whereas this conference views with alarm the continued sale of motor vehicle fuels on government military and other reservations, upon which no state tax has been collected, such tax free fuel being used on the public highways.

Id. The amendment was adopted by the Senate. The bill went to conference committee composed of Senators McKeller, Hayden and Fraser and Representatives Cartwright, Warren, Woodington, Walcott and Terpin. The Conference Committee revised Senator Hayden's amendment as follows:

> That all taxes levied by any state, *territory, or the District of Columbia* upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, *filling stations, licensed traders,* and other similar agencies, located on United States military or other reservations, when such fuels are *not for the exclusive use of the United States.* Such taxes, so levied, shall be paid to the proper taxing authorities of the state, *territory, or the District of Columbia,* within whose borders the reservation affected may be located.

H.R. Rep. No. 2902, 74th Cong., 2d Sess. (1936). This emphasis reflects the language which was expanded or changed from the prior amendment.

The Conference Committee thus made three changes in Section 10:

1. It expanded the class of protected state revenues to include territorial and District of Columbia gas taxes;
2. It expanded the specifically mentioned outlets which must impose state motor fuel taxes to include *filling stations* and *licensed traders;* and
3. It narrowed the class of motor fuels which may be sold free of the state tax from "governmental purposes" to the "exclusive use of the United States."

This amendment became the Hayden-Cartwright Act of 1936.

II. The 1830 Treaty Does Not Provide The Express Exemption From State Taxation Required To Rebut The Presumption That Oklahoma May Tax The Income Of Tribal Members Not Residing In Indian Country Set Aside For The Respondent. Tribal Self-Governance Principles Also Do Not Provide A Basis For Preempting Application Of Oklahoma's Income Tax.

The Court of Appeals found that "[r]esidency is simply not relevant" to its determination that the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333, precludes imposition of state income tax on Chickasaw members employed by the Respondent but residing outside Indian

Country in Oklahoma. Petition, App. at 30a. In so concluding, the court failed to apply the proper standard for determining whether Oklahoma has authority to tax those members and misconstrued the treaty itself.

The Court of Appeals' refusal to consider the issue of residency is a replay of the error this Court found in *Sac and Fox Nation v. Oklahoma Tax Commission*, 967 F.2d 1425 (10th Cir. 1992), *rev'd*, 113 S. Ct. 1985 (1993). There, as here, the Tenth Circuit held that residency was irrelevant to its determination that Oklahoma could not lawfully tax the income of tribal members receiving wages from the tribe. This Court vacated the decision, holding that the residence of a tribal member "is a significant component" of the presumption against state tax jurisdiction set out in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993). In remanding the case for further consideration, the Court directed the lower court to first determine residency, noting that "*if the tribal members do live in Indian Country*, our cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty." *Id.* at 1992 (emphasis added). When the tribal members subject to tax *do not* live in Indian Country, however, there is no presumption against state tax jurisdiction. The opposite presumption governs instead.

The Chickasaw members against whom Oklahoma seeks to enforce its income tax are residents of Oklahoma living outside the territorial boundaries of the Chickasaw Nation. Absent express federal law to the contrary, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law

otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *accord Sac and Fox Nation*, 113 S. Ct. at 1991 (citing *McClanahan*, 411 U.S. at 176); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 n.16 (1985). The income tax at issue here is uniformly imposed on all Oklahoma residents, excluding tribal members who have chosen to live in the territory set apart for their particular tribe, and the State's authority to do so reflects the long-established principle that "[e]njoyment of the privileges of residence within the State, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 279 (1932). The Court of Appeals' strained, confusing conversion of the presumption in favor of Oklahoma's authority to impose an income tax on Chickasaw members into some lesser form of evidentiary "burden-shifting" device (Petition, App. 26a-27a) simply, and unjustifiably, departs from settled Indian law principles which, in turn, are rooted in equally settled tax doctrine.

The question thus becomes whether "express federal law" exists upon which to find preemption of Oklahoma's taxing authority. The Court of Appeals looked to Article IV of the 1830 treaty, 7 Stat. 333-34, but that provision clearly has no application here. Read in its entirety, Article IV was a grant of authority to the Choctaw Nation and, by virtue of the 1837 Treaty of Doaksville, 11 Stat. 573, to the Chickasaw Nation with respect to "all the persons and property that may be within their limits west" – i.e., within the "tract of country west of the Mississippi River" granted to those tribes in fee simple

pursuant to Article II of the 1830 treaty. While this land was never to "be embraced in any Territory or State," subsequent legislation proved otherwise. *See generally* Francis Paul Prucha, *The Great Father* 897-92 (1984); Susan Work, *The "Terminated" Five Tribes of Oklahoma: The Effect of Federal Legislation and Administrative Treatment on the Government of the Seminole Nation*, 5 Am. Indian L. Rev. 81 (1978).

Part and parcel of the eventual loss of Indian Country status for much of the initial treaty grant and Oklahoma's admission into the Union was subjecting Chickasaw members to state law with respect to legal relationships, including residency, established outside their Tribe's greatly diminished territory. Crediting the Court of Appeals' construction of Article IV, necessarily would mean that tribal members are exempt from *all* Oklahoma laws with respect to non-Indian Country transactions, since this Court made clear in *Mescalero Apache Tribe* that the general applicability of state law to tribal members "going beyond reservation boundaries" is "as relevant to a State's tax laws" as it is to other laws. 411 U.S. at 148-49; *cf. Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976) (rejecting contention that section 6 of the General Allotment Act, 25 U.S.C. § 349, authorized imposition of non-real property taxes and observing that, were the contrary position to be accepted, its laws for "*all* jurisdictional purposes – civil and criminal" would apply). The Court of Appeals did not address the plainly implausible implications of its reasoning.

The Court of Appeals also did not address the issue actually left undecided in *Sac and Fox Nation:* "whether

the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian Country." 113 S. Ct. at 1992. The absence of such discussion was not an oversight, since the Respondent has never relied on inherent sovereignty principles as an independent basis for preemption of the state income taxes. Its reluctance to make that assertion is understandable. To hold that the Chickasaw Nation may reach beyond its territorial boundaries to exempt nonresident members from the burden of Oklahoma's income tax would accord the Tribe a *greater* sovereignty than that enjoyed by the States themselves. In relations among the States, one State's sovereignty does not extend into the territory of any other State, but is wholly contained within its own borders. In *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881), an early state tax case, the Court held that Maryland was entitled to impose a tax on New York and Pennsylvania bonds held by a Maryland resident, even though the bonds would be exempt from tax in the issuing state: "One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular."[26] The Court went on to note that

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[26] In a somewhat later holding, the Court refused to enjoin condemnation of real property owned by Georgia in Tennessee, finding that "[l]and acquired by one state in another State is held subject to the laws of the latter and to all the incidents of private ownership. . . . The sovereignty of Georgia was not extended into Tennessee." *Georgia v. Chattanooga*, 264 U.S. 472, 480-481 (1924). The highest courts of at least three States have also held that each State's sovereignty is contained within its territorial borders. *Kansas v. Holcomb*, 116 P. 251 (Kan. 1911)

regardless of the source of the income, "[a]ll the obligations which rest on the holder of the debt as a resident of the State in which he dwells still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself." *Id.* at 595. This was the same reasoning underlying the Court's decision in *Lawrence*, which upheld Mississippi's right to tax the income earned by a Mississippi resident on road projects in Tennessee:

> The tax . . . is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship.

286 U.S. at 281. No doubt exists, therefore, that, even were the Respondent entitled to status coequal with the States, it could not arrogate to itself the power to insulate

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(Missouri could not claim a Kansas property tax exemption for a Missouri waterworks plant located in Kansas); *Warran County, Louisiana v. Hester*, 54 So. 2d 12 (La. 1951) (Louisiana constitutional provision exempting all public property from taxation did not extend to a Mississippi-owned bridge that extended into Louisiana). *Minnesota v. Hudson*, 42 N.W.2d 546 (Minn. 1950) (the City of Hudson, Wisconsin, could not claim the property tax exemption Minnesota granted to its own municipalities). In each case, the holding was based on the principle that when one State moves beyond its jurisdictional boundaries into another State's territory, "it comes as a private party and brings with it none of the prerogatives of sovereignty." *Holcomb*, 116 P. at 254.

its members from the income tax of another State merely because the income taxed was earned within the Chickasaw Nation's territorial boundaries by virtue of tribal employment.

Historically, Indian tribes within the borders of the United States have been regarded "as having a semi-independent position when they preserved their tribal relations; *not as States, not as nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, . . . " *McClanahan,* 411 U.S. at 173 (quoting *United States v. Kagama,* 118 U.S. 375, 381-382 (1886)) (emphasis added). Concluding that the Chickasaw Nation's retained sovereignty provides an independent federal law basis for preempting application of Oklahoma tax law as to non-Indian Country relationships not only would effectively impute to the Tribe governmental status *exceeding* that of the individual states but also would give it extra-territorial authority wholly inconsistent with heretofore recognized limits on inherent tribal powers. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 142 (1982) ("[w]e do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). Tribal members, by establishing residency outside their Tribe's territory, have elected to partake of the benefits and to assume the burdens attendant to such status. One burden is payment of taxes on income, including income earned from tribal employment. With respect to those taxes, they are not "reservation Indians" (*Williams v. Lee,* 358 U.S. 217, 220 (1959)) as to whom Congress has evinced a "jealous

regard for Indian self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). Consequently, even if the Respondent opts to raise at this late hour the question left open in *Sac and Fox*, it must be answered negatively.

CONCLUSION

The Court of Appeals' Judgment should be vacated with respect to the invalidation of Oklahoma's motor fuel taxes. It should be reversed with respect to the invalidity of Oklahoma's income tax.

Respectfully submitted,

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